SUPREME COURT, U. S. FEB 1 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-235

MARCO DE FUNIS, *et al.*,

Petitioners,

v.

CHARLES ODEGAARD, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AS *AMICUS CURIAE*

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BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AS *AMICUS CURIAE*

Interest of the *Amicus*[1]

Amicus, NAACP Legal Defense and Educational Fund, Inc., is interested in the present case for several reasons. First, the black community has been grossly underrepresented in terms of the number of black attorneys available. To a large extent, this was due to deliberate discrimination.[2] As recently as 1968, only about one percent of the

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[1] Letters of consent from counsel for the petitioners and the respondents have been filed with the Clerk of the Court.

[2] See, *e.g.*, *Missouri ex rel Gaines* v. *Canada*, 305 U.S. 337 (1938); *Sweatt* v. *Painter*, 339 U.S. 629 (1950); and see Leonard, *The Development of the Black Bar*, 407 THE ANNALS 134, 137-39 (1973).

total number of attorneys in the United States were black, a figure probably not substantially higher than in 1900.[3] Recent figures indicate that slightly over seven percent of total law school enrollment in the last year is minority students, including blacks, Chicanos, American Indians, Puerto Ricans, etc.[4]

In the Legal Defense Fund's experience the need for black (and other minority group) lawyers to serve their own community is clear. Although lawyers of all races have made many contributions to the cause of equal justice, it is essential that there be black lawyers who live and practice law day to day and year after year as integral parts of their communities.[5] In the main and over the long run, they are most disposed to and capable of performing services for the minorities of which they are a part.[6] Lawyers are critical to political activity, building businesses, and social development, to say nothing of legal representation in resolving public and private differences. Without an adequate number of lawyers, minority progress in all these areas will be stunted.

In order to help increase the number of black lawyers, the Legal Defense Fund administers, through its subsidiary, the Earl Warren Legal Training Program, Inc., programs to provide scholarships for black law students and

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[3] Gellhorn, *The Law Schools and the Negro*, 1968 Duke L.J. 1069.

[4] In 1972-73, there were 4,423 black students, or 4.3% of the total enrollment. This was up from only 1,254 in 1968-69. Parker & Stebman, *Legal Education for Blacks*, 407 THE ANNALS 144, 147 (1973).

[5] See Carl, *The Shortage of Negro Lawyers: Pluralistic Legal Education and Legal Services for the Poor*, 20 J. Legal Ed. 21 (1967); McGee, *Black Lawyers and the Struggle for Racial Justice in the American Social Order*, 20 Buffalo L. Rev. 423 (1971).

[6] See, *NAACP* v. *Button*, 371 U.S. 415 (1963); *Sanders* v. *Russell*, 401 F.2d 241 (5th Cir. 1968).

assistance to black law graduates seeking to set up practice in communities without sufficient legal representation. Obviously, for the success of these programs there must be significant numbers of black law students. Over the past few years, which coincide with institution of affirmative admission programs like that at the University of Washington Law School, the Fund has had a substantial increase in the number of applications for both programs from highly qualified black students.[7]

The second interest of the Legal Defense Fund in this case arises from the possible implications of this case for a wide range of litigation. A reversal not only could undermine voluntary programs to achieve the reality (and not merely the appearance) of equal opportunity, but also could cut back sharply on the remedial powers of courts (see, *e.g.*, *United States* v. *Montgomery County Board of Education*, 395 U.S. 225 (1969)) and agencies (see, *e.g.*, *Contractor Ass'n of Eastern Pa.* v. *Secretary of Labor*, 442 F.2d 159 (3rd Cir. 1971) to require affirmative action.[8]

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[7] Between 1967 and 1973 over two hundred and thirty black students who were recipients of scholarship assistance from the Fund graduated from law schools. These recipients and graduates have matriculated at forty-five of the major law schools in the East, South and Mid-West, and at both national and regional law schools. At present more than three hundred and sixty are enrolled in the program.

During the same span of years the Legal Defense Fund has trained or has in training in its post-graduate fellowship program over eighty young lawyers for civil rights practice. They have distinguished themselves professionally, in politics, business and civic affairs. In each of the last two years the Fund has had almost two hundred applicants for twelve positions. Comparable ratios prevail with respect to applicants for scholarships.

[8] The question which arises in this case, in a Northern state, implicates also the South. In the South, where higher education remained segregated by law in many places until well after this Court's decision in *Brown*, effective steps to dismantle the dual system in many colleges and universities are just now commencing.

ARGUMENT

I.

The Minority Group Admissions Policies of the University of Washington School of Law Are Constitutional.

It is important to focus precisely on what the University of Washington Law School was doing, and what petitioner Marco De Funis, Jr., may complain about. The School was faced with the problem of deciding which of a large group of *qualified*[9] applicants it should admit. These decisions were made by a complex process; applicants could not, as petitioner De Funis urges, be chosen by the rigid application of mathematical formulae. A small group of students were more or less automatically admitted if they had a high Predicted First-Year Average (PFYA).

These steps were occasioned by *Adams* v. *Richardson*, 480 F.2d 1159 (D.C. Cir. 1973), which the undersigned *amicus* sponsored. It would be a misfortune were this case to give rise to any principles which might hinder the fullest desegregation process in higher education in Southern and border states. Recently, in its responses to the previously submitted desegregation plans, which it found inadequate, the Department of Health, Education, and Welfare made clear that affirmative remedial measures must be undertaken to achieve black access to public higher education; these measures will have to be complex and far-reaching to achieve desegregation in fact.

[9] Both petitioners and certain of their supporting *amici* attempt to raise the specter of law schools admitting large numbers of unqualified black and other minority students with the result of excluding qualified whites and eventually foisting unqualified attorneys on the black community. There is no basis in the record to substantiate such a contention with regard to the University of Washington. All the testimony clearly indicates that in every instance persons were admitted who were reasonably believed to be qualified and capable of succeeding in law school and as lawyers.

Everyone else, including De Funis and most of the minority group students, went through further processing.[10]

De Funis' complaint arises because in that processing minority group students were handled separately from majority group students.[11] All applications from minority group members were given to two particular admissions committee members who compared the applications against each other. Majority group applications similarly were compared with each other. The most promising in each group were chosen and the two lists aggregated.

As to both groups much more than PFYA was considered, as indeed was proper. After all, the scale only purported to predict what grades a student would make in his first year of law school; it did not even predict his performance throughout law school or on a bar examination. It manifestly could not measure criteria at least as legitimate as the grades an applicant would receive in law school, viz., his long term success and contributions to the profession and the community. These more difficult predictions were made on the basis of not only PFYA, but also by weighing factors such as extracurricular activities, interest in community affairs, letters of recommendation, and the type of undergraduate curriculum pursued. As a result, a number of majority group applicants with lower

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[10] Thus, this case does not involve anything analogous to the "merit system," or an attack on it. A PFYA score cannot be equated with a score on a Civil Service examination, a typing test, or a driving test. Certainly, regardless of whether a strict merit system based on tests *may* be used under certain circumstances (see, *Chance* v. *Board of Examiners*, 458 F.2d 1167 (2nd Cir. 1972)), there is no constitutional requirement that it *must* be.

[11] At least one *amicus* professes difficulty with the concept of defining certain persons as members of "minority groups." This has presented no problem, however, either to Congress (see, 20 U.S.C. § 1619(9)(A), or to this Court. See, *Hernandez* v. *Texas*, 347 U.S. 475 (1954).

PFYA's than De Funis were admitted or put on the waiting list ahead of him.[12]

The question, therefore, is whether the procedure now[13] complained of by De Funis, that minority students and majority students were compared only with others in the same group, violated his constitutional rights. Simply stated, the School recognized that the PFYA is significantly less predictive of what it purports to measure for minority than for non-minority students, largely because of historic educational and social discrimination. This was the expert testimony at trial (St. 128-131) and petitioner did not rebut it. Just as the number of minority students admitted to the University as a whole had been limited by the application of standard criteria, as the President of the University testified (St. 222-229), it could be expected that if the same weight was given to the PFYA for both groups, it would operate as a "built-in headwind" [14] resulting in exclusion of minorities from the Law School.

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[12] This fact is significant, since even if there had been *no* minority admissions program this record does not demonstrate that De Funis would have been admitted to law school. He was in the lowest one-fourth of the waiting list, with at least fifty-five persons ahead of him; thirty-six minority group applicants with PFYA's lower than De Funis were sent letters of acceptance, and only eighteen accepted; even if none had accepted he apparently would not have been reached.

[13] The original complaint did not challenge his exclusion on racial grounds. In addition to the in-state resident issue, the complaint urged, in essence, a denial of due process because others had arbitrarily been admitted to the school even though they had lesser qualifications than did petitioner (A. 14-15; 17). The question of minority students was raised as a matter of defense (over the objection of petitioner's counsel (St. 230-231)) by the Law School to explain why some with lesser paper qualifications than De Funis were admitted before he was. Much of the dissenting opinion below was an attack on the procedures and standards used *generally* to select among the applicants. Whatever might be the merits of a due process attack on the method of administering the selection system, one has not been presented here.

[14] *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 432 (1971).

The School, therefore, took a course that was not only prudent, but perhaps constitutionally required. If it did *not* institute appropriate differential treatment of minority applicants, a combination of a low minority acceptance rate,[15] and selection by criteria which were known to have questionable predictive validity, might lead to litigation by members of excluded groups.[16]

The procedure employed—comparing minority applicants with each other, and picking the most promising from that group—avoided the perceived discriminatory effect of comparing minority students with majority ones on the basis of PFYA. The procedure was *not* designed to achieve an over-all ranking that would absolutely correspond to promise as a student and as a lawyer, since it is doubtful that the data at hand permitted a pre-law school comparison of the ultimate professional promise of the applicants, whether minority or majority. Rather, it sought to ensure that no applicants were accepted of whom respondents did not expect satisfactory achievement.

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[15] As the Fifth Circuit has cogently said, "In the problem of racial discrimination, statistics often tell much, and Courts listen." *Alabama* v. *United States*, 304 F.2d 583, 586, *aff'd*, 371 U.S. 37 (1962). See also, *Turner* v. *Fouche*, 396 U.S. 346 (1970).

[16] De Funis and his *amici* urge that the Law School should not have done anything about the effects of past discrimination because neither the University nor the Law School had any responsibility for it. This is an unacceptably insular way of viewing a particularized result of the national problem of racism.

This case involves a national law school, with a policy of admitting a substantial number of students from out of state. Even if the State and the institution themselves were totally free of any taint of racial discrimination, the admission of some students under criteria that operate to exclude others who were victims of racial discrimination in other parts of the country could raise serious equal protection questions. See, *Oregon* v. *Mitchell*, 400 U.S. 112, 133-34 (1970) (Black, J.) (the effects of racial discrimination, wherever it occurred, present a national problem that can be responded to even with regard to states without a history of discrimination).

One reason for the differential treatment of minority applicants was, of course, to make it possible for a significant number to be admitted to Law School. And, just as the basis for realizing that there was something wrong with rigid selection procedures was the low number of minority admissions, so the basis for weighing the effectiveness of the new method was whether the number admitted reasonably reflected the number of minority persons in the community at large. Thus, a *goal* was aimed for, but there was no quota. The distinction between the two is clear; a quota is a fixed number or set ratio that *must* be filled and, generally, may not be exceeded. A goal is a target to be used as a yardstick for judging the efficacy of a program in achieving true equality. See, *e.g.*, *Swann* v. *Charlotte-Mecklenburg Board of Ed.*, 402 U.S. 1, 25-26 (1971).

There was no quota, and at no time were minority applicants accepted who did not meet the same standard imposed on all applicants, minority and non-minority alike, *viz.*, the expectation of satisfactory achievement in law school and the profession. Indeed, the Law School could not, for the purpose of filling a quota, have deliberately chosen a minority student with less over-all promise than De Funis even if it had wanted to, because the data available was not sufficiently precise to allow such judgments. Thus, it simply cannot be determined, and certainly not from this record, that De Funis was kept out of law school because of his race in the sense that unqualified minority applicants were admitted on the basis of *their* race.[17]

[17] The admission of unqualified minority students in order to obtain a fixed number, not the situation presented here, would indeed be of questionable constitutionality if it resulted in the exclusion of other qualified applicants.

Another aspect of the admissions policies of the Law School was its judgment that one factor in determining the qualities relevant to the contribution an applicant might make to the profession and the community, is whether there is a lack of lawyers serving the needs of minorities of which the applicant is a member. Certainly, a law school, in assessing its obligation to serve the needs of society, may decide that it will not use selection criteria that prevent minority groups from obtaining legal representation essential to the vindication of constitutional rights.[18]

In summary, the University of Washington acted consistently with its Fourteenth Amendment duty to ensure that black, Chicano, and American Indian applicants were not in fact denied equal access to law school because of factors relating directly to their race.[19] If the equal protection clause is ever to have practical meaning, it cannot be interpreted to prohibit such a program for: "To use the Fourteenth Amendment as a sword against such State power would stultify that Amendment." *Railway Mail Assoc.* v. *Corsi*, 326 U.S. 88, 98 (1945) (Frankfurter, J., concurring).

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[18] See, *NAACP* v. *Button*, 371 U.S. 415 (1963); *Sanders* v. *Russell*, 401 F.2d 241 (5th Cir. 1968); *Sobol* v. *Perez*, 289 F.Supp. 392 (E.D. La. 1968).

[19] An analogy can be drawn to the recognized power of Congress to adopt broad remedial legislation it feels necessary to ensure the effective enforcement of Fourteenth Amendment rights. See, *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966); cf., *Welsh* v. *United States*, 398 U.S. 333, 371 (1970) (White, J., dissenting).

II.

The Minority Admissions Program Does Not Violate Title VI.

Finally, a comment should be made concerning the alternative ground advanced by De Funis, that § 601 of the Civil Rights Act of 1964[20] invalidates the method by which the Law School selected applicants.[21] We urge, to the contrary, that Title VI, in conjunction with the implementing regulations issued and interpreted by the Department of Health, Education, and Welfare, supports the School's actions. Recently, this Court upheld the power of HEW to issue appropriate regulations pursuant to § 601 in exercising its authority to dispense funds in aid of education. *Lau* v. *Nicholas*, —— U.S. ——, 42 U.S.L. Week 4165 (Jan. 21, 1974).[22]

The relevant regulations, found in 45 C.F.R. 80.3 (1973), are set out in the margin.[23] As noted in *Lau*, 80.3(b)(2)

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[20] 42 U.S.C. § 2000(d).

[21] Respondents have urged that this issue is not properly before the Court. However, in the event it is determined that the question has been properly raised, *amicus* wishes to bring to the Court's attention information pertinent to its consideration.

[22] *Lau* adhered to the general rule that deference would be given to the judgment of an administrative agency, as reflected in its regulations and their interpretation, as to the interpretation of a statute it is charged with enforcing. See, *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U.S. 205, 210 (1973).

[23] 80.3(b)(2) A recipient, in determining the types of services financial aid, or other benefits, or facilities which will be provided under any such program, or the class of individuals to whom, or the situations in which, such services, financial aid, other benefits, or facilities will be provided under any such program, or the class of individuals to be afforded an opportunity to participate in any such program, may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subject-

prohibits the use of criteria or other methods of administration that have *the effect* of cutting persons off from programs because of their race. (42 U.S.L. Week at 4167.) More explicitly, 80.3(b)(6)(ii) allows a recipient that has not been guilty of deliberate discrimination to take affirmative action "to overcome the effect of conditions" that have limited participation by racial minorities.

This is precisely what the University of Washington Law School has done. Well aware of the small number of minority students, and with substantial reason to believe that this resulted because standardized criteria—doubtful predictors of success as students or lawyers—screened them out, the school took appropriate "action to overcome [these] effects."

The Department has construed Title VI, and the regulations, to permit precisely the kind of action taken by respondents. Thus, it approves of the use of differential and "non traditional" criteria for the admission of minority students, it recognizes the effect of generalized discrimina-

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ing individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color or national origin.

* * * *

(b) (6) (i) In administering programs regarding which the recipient has previously discriminated against persons on the ground of race, color or national origin the recipient must take affirmative action to overcome the effects of prior discrimination.

(ii) Even in the absence of such prior discrimination, a recipient may take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color or national origin.

tion against minorities as justification, and distinguishes between "goals" and "quotas." [34]

CONCLUSION

The Legal Defense Fund urges that the foregoing analysis of the actual constitutional issue presented in this case requires that the decision of the Supreme Court of Washington be affirmed. Counsel for *amicus* would be remiss in their duty as officers of the Court, however, if they did not make known their belief that the proper disposition of this case may be to dismiss the writ as improvidently granted, since it is an inappropriate one for broad constitutional pronouncements concerning the validity of attempts to secure adequate minority representation. First, a decision by this Court one way or the other will in no way affect the rights of any of the petitioners, since Marco De Funis, Jr., will complete law school in June, 1974, regardless. Thus, the case is already effectively moot.[35] Second, it would be far more appropriate to address questions such as the validity of quotas, the admission of unqualified minority students in preference to qualified whites, and the exclusion of a white applicant because of the acceptance of minority ones, in a case that actually presented those issues, as this one does not.[36] Any decision

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[34] These interpretations are found in letters by or on behalf of the Director of the Office of Civil Rights of HEW, written in response to inquiries. A representative letter is set out in an appendix to this Brief, and we have deposited copies of other representative letters in the office of the Clerk.

[35] The action was not brought on behalf of any class, and no general relief, such as enjoining the future use of the challenged procedures, was either sought or granted.

[36] It would also be appropriate to wait for a case which properly raised in a fully-developed form the question of the applicability of Title VI of the Civil Rights Act of 1964 and the implementing regulations to these issues.

as to those questions here would be premature, because the present record simply says little or nothing about unforeseeable implications of new doctrine.

Respectfully submitted,

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APPENDIX

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

September 25, 1972

Honorable Donald C. Brotzman
House of Representatives
Washington, D.C. 20515

Dear Mr. Brotzman:

Thank you for your inquiry of August 16 on behalf of Mr. Kenneth Covell of Boulder, Colorado.

Mr. Covell is concerned about students he knows of with good grades and good examination scores who were not accepted to the University of Colorado's law and medical schools. Mr. Covell feels that the University rejected these students because the Department of Health, Education, and Welfare requires institutions of higher education receiving Federal funds to have a proportional representation of minority students in its enrollment.

As you know, the Office for Civil Rights administers Title VI of the Civil Rights Act of 1964, which requires that recipients of Federal financial assistance offer their benefits and services without regard to race, color, or national origin. Under Title VI institutions of higher education must recruit, admit and make all course offerings and college-supported activities available to students in a nondiscriminatory manner. However, no quota of minority students is required to comply with this law. The University of Colorado participates in various Federal financial assistance programs, and, therefore, is subject to the requirements of Title VI. In fall 1970 the University reported to

us that minority enrollment in its medical school was 3.2 percent. This is the latest data available to us at this time. While the University did not file a separate report for its law school, we are confident that minority enrollment in this school is of the same order of magnitude as that of the medical school.

This Office is aware that several institutions of higher education receiving Federal financial assistance have established programs to increase the number of minority group students they enroll. Such programs may include special efforts to recruit minority applicants, financial assistance and evaluation of applicants' potential through the use of non-traditional criteria. Quite often institution officials state a goal for a specified level of minority enrollment. In those cases that have come to our attention, goals differ from quotas in two main major respects. First, it is the objective of the goals to increase the participation of groups which have not been enrolled in significant numbers in the past. Second, the goals do not constitute a ceiling, i.e., no more than a specified number will be admitted. Clearly the intent of goals is the opposite of that of quotas, to include rather than limit.

In general the programs described above are consistent with the requirements of Title VI. Numerous court decisions have held that differential treatment on the basis of race is not a violation of the Constitution where its intent is to overcome the effects of past discrimination. Negroes, Spanish-surnamed Americans, and American Indians, as groups, have been subjected to various kinds of discrimination which have resulted in substantially diminished opportunities for them to derive the benefits of a higher education. It should be noted, however, that preferential ar-

rangements for minority students cannot be established on a permanent basis. At some point, the appearance of minority group members in an institution's enrollment would be such as to require abandonment or suitable modification of the special programs.

We appreciate your personal interest in this matter. If the Department can be of further assistance, please let me know.

Sincerely yours,

(Sgd.) Patricia A. King

J. Stanley Pottinger
Director, Office for Civil Rights